TEOH YOOK HUWAH

v.

MENTERI HAL EHWAL DALAM NEGERI & ANOR.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK GUNN CHIT TUAN,
DATO' EDGAR JOSEPH JR., DATO' HJ.
MOHD. EUSOFF CHIN SCJJ
[SC CRIMINAL APPEAL NO. 05-95-91]
21 DECEMBER 1992

ADMINISTRATIVE LAW: Application for habeas corpus on the ground of assault during detention.

EVIDENCE: Allegation of assault contained in affidavit filed in support of application - No denial filed in opposition - Allegation unsupported by evidence - Effect of - Hearsay evidence.

The appellant was detained pursuant to the provisions of the Dangerous Drugs (Special Preventive Measures) Act 1985 (the Act). The appellant applied for an order of *habeas corpus* on the ground that during her period of detention pending enquiries at the Taiping Police Station, she had been assaulted by unidentified police personnel on an unspecified date and so the conditions of her detention were such as to render her continued detention unlawful.

The only material relied upon in support of the allegation of assault was an affidavit of the appellant's elder sister filed in support of the allegation. The learned trial Judge found as a fact that the appellant had been assaulted as alleged because there was no affidavit of denial filed in opposition by the respondent but dismissed the application on other grounds. The fact of assault was regarded as common ground by both Counsel in the appeal.

Held:

[1] The bare allegation of assault made in the affidavit of the appellant's sister was wholly unsupported by any evidence there being no suggestion that she was herself present at the time of the alleged assault.

[2] The allegation of assault by the appellant's sister was worthless as evidence being entirely hearsay. There being no evidence of assault there was no need for an affidavit of denial.

[3] The factual foundation for the point of law advanced by Counsel for the appellant, the alleged assault, was conspicuously absent and so the appeal must be dismissed.

[Appeal dismissed]

[Bahasa Malaysia **Translation of Headnote**]

UNDANG-UNDANG PENTADBIRAN: Permohonan untuk habeas corpus atas alasan serangan semasa penahanan.

KETERANGAN: Penyataan serangan terkandung dalam afidavit yang difailkan dalam menyokong permohonan - Tiada penafian yang difailkan sebagai tentangan - Penyataan tidak disokong oleh keterangan - Kesan keterangan dengar cakap.

Perayu telah ditahan menurut kepada peruntukan-peruntukan Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985 (Akta tersebut). Perayu telah memohon untuk perintah *habeas corpus* atas alasan bahawa semasa beliau berada di bawah tahanan di Balai Polis Taiping sementara menunggu siasatan, beliau telah diserang oleh pegawai polis yang tidak dikenali pada suatu tarikh yang tidak ditentukan dan dengan itu keadaan tahanannya adalah sebegitu rupa di mana penyambungan penahanannya disifatkan tidak sah di sisi undang-undang.

Satu-satunya bahan yang dipersandarkan kepada untuk menyokong dakwaan serangan tersebut adalah afidavit kakak perayu yang difailkan dalam menyokong dakwaan tersebut. Hakim perbicaraan yang bijaksana tersebut telah mendapati sebagai suatu fakta bahawa perayu telah diserang sebagai mana yang didakwa memandangkan tiada afidavit penafian yang difailkan sebagai tentangan oleh responden tetapi beliau mengenepikan permohonan tersebut atas alasan lain. Fakta serangan telah disifatkan sebagai alasan biasa oleh Peguam di kedua-dua pihak dalam rayuan tersebut.

Diputuskan:

[1] Dakwaan serangan yang dibuat dalam afidavit kakak perayu tidak disokong langsung oleh sebarang keterangan dengan tiada saranan bahawa beliau sendiri hadir semasa serangan yang dikatakan itu berlaku.

[2] Dakwaan serangan oleh kakak perayu adalah tidak berguna memandangkan keterangannya cuma berdasarkan kepada dengar cakap sahaja. Oleh kerana tiada keterangan mengenai serangan, maka tidak perlu untuk sesuatu afidavit penafian.

[3] Asas fakta bagi perkara undang-undang yang telah dikemukakan oleh Peguam bagi perayu, serangan yang didakwa tersebut, tidak timbul langsung dan dengan itu rayuan berkenaan mestilah ditolak.

[Rayuan ditolak].

Cases referred to:

Middleweek v. Chief Constable of the Merseyside Police & Anor. [1990] 3 All ER 662 ***(cit)***

Weldon v. Home Office [1990] 3 All ER 672 ***(cit)***

Lau Lek Eng & 7 Ors. v. the Minister of Home Affairs [1972] 2 MLJ 4 ***(cit)***

Kidar Nath v. State of Punjab AIR [1960] Punj. 122 ***(cit)***

Koh Yoke Koon v. Minister for Home Affairs & Anor. [1988] 1 MLJ 45, [1988] 2 MLJ 301 ***(cit)***

Hague v. Deputy Governor of Parkhurst Prison & Ors. [1991] 3 AER 733 ***(refd)***

Theresa Lim Chin Chin v. Inspector General of Police [1988] 2 MLJ 293 ***(cit)***

Cooke v. New River Co. [1988] 38 Ch. D. 56 at 71 ***(refd)***

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3, 3(2), 6(1), 11A(1)

For the appellant - Karpal Singh; M/s. Karpal Singh & Co.

For the respondents - Balia Yusof bin Haji Wahi (Norbahari bin Baharuddin with him), DPP

JUDGMENT

Edgar Joseph Jr. SCJ:

The appellant had been arrested on 13 September 1990 pursuant to the provisions of s. 3 of the Dangerous Drugs (Special Preventive Measures) Act 1985, ("the Act"), and on 10 November 1990, pursuant to the provisions of s. 6(1) thereof, the Deputy Minister for Home Affairs signed and issued a Detention Order authorising her detention for a period of two years at the Pusat Akhlak, Pulau Jerejak, Penang, and thereafter, on 9 November 1992, pursuant to the provision of s. 11A(1) thereof, he directed that the duration of the Order be extended for a further period of two years at the same place.

Counsel for the appellant, Mr. Karpal Singh, had applied to the High Court, Penang, for an order of *habeas corpus* relying only upon one ground; namely, that during the period of detention pending enquiries at the Taiping Police Station pursuant to the provisions of s. 3(2) of the Act, the appellant had been assaulted by unidentified police personnel, on an unspecified date, and so the conditions of her detention were such as to render her continued detention wrongful. The only material relied upon in support of the allegation of assault was an affidavit of her elder sister, Teoh Siew Hoi affirmed on 18 December 1990 and filed in support of the application, but because there was no affidavit of denial filed in opposition thereto, the learned Judge in the Court below, found as a fact that the appellant had been assaulted as alleged. To be fair to the learned Judge it should also be added that before the application for *habeas corpus* was filed the solicitors for the appellant had written a letter dated 28 September 1990 addressed to the OCPD, Taiping, complaining - and here we would quote its actual words - "we understand that our client had been assaulted while under detention", but it evoked no reply.

In the Court below, Mr. Karpal Singh had relied heavily on the English Court of Appeal cases of *Middleweek v. Chief Constable of the Merseyside Police & Anor.* [1990] 3 All ER 662 and *Weldon v. Home Office* [1990] 3 All ER 672, but the learned Judge said that they were distinguishable because neither was a *habeas corpus* case; they being actions for damages for false imprisonment by convicted persons in respect of incidents during their confinement. Instead, he considered that the Singapore case of *Lau Lek Eng & 7 Ors. v. the Minister of Home Affairs* [1972] 2 MLJ 4 was more to the point and he relied, in particular, on the following passage in the judgment of Wee Chong Jin CJ:

> The other grounds relied on by the applicants in support of their application for *habeas corpus* relate to the manner and conditions of their detention and not to the legality of their detention under the Act. In my judgment, on those grounds, *habeas corpus* is not an available remedy and I would dismiss the application with costs.

In the event, the learned Judge dismissed the application for *habeas corpus* on the ground that *habeas corpus* was not the remedy where a detainee was proved to have been assaulted and from that decision the appellant has appealed to this Court.

Before us, Mr. Karpal Singh had again placed reliance upon the cases of *Middleweek* and *Weldon* as well as the Indian case of *Kidar Nath v. State of Punjab AIR* [1960] Punj. 122 and the local case of *Koh Yoke Koon v. Minister for Home Affairs & Anor.* [1988] 2 MLJ 45 affirmed on appeal to the Supreme Court [1988] 2 MLJ 301.

The proposition of law in *Koh Yoke Koon* that every step in the process of detention must be followed with extreme regularity by the Executive otherwise the continued detention of the detainee would be illegal was especially stressed by Counsel.

We would interject to remark that *Weldon* went on appeal by the Home Office to the House of Lords, where it was heard together with another appeal, namely, *Hague v. Deputy Governor of Parkhurst Prison & Ors.* [1991] 3 AER 733, the prisoner being the appellant.

In *Weldon's* case, the prisoner claimed damages for false imprisonment in respect of his confinement overnight in a strip cell in the prison in which he was serving a sentence where he alleged that his clothes had been taken from him, he was forced to remain until the following morning and had been unlawfully assaulted by certain police officers. The Court of Appeal had dismissed an appeal against the decision of the Assistant Recorder refusing to strike out the action in respect of his confinement in the strip cell on the ground that the facts disclosed an arguable case of false imprisonment either because he had been unlawfully deprived of his residual liberty or that he had been kept in intolerable conditions.

In *Hague*, the prisoner had sought judicial review of the decision of the deputy governor of Parkhurst Prison to segregate him and thereafter to transfer him to Wormwood Scrubs Prison for continued segregation, and of the decision; of the board of visitors of Wormwood Scrubs Prison to authorise his continued segregation for 28 days. The Court of Appeal refused to quash the decisions and dismissed his claim for damages for false imprisonment.

In the event, the House of Lords reversed the decision of the Court of Appeal in *Weldon* whilst affirming the decision of that Court in *Hague* (see [1990] 3 All ER 687). The House of Lords also disapproved of the *dictum* of Ackner LJ (as he then was) in *Middleweek (supra)* that a person lawfully detained in a prison cell would cease to be so lawfully detained if the conditions in the cell were such as to be seriously prejudicial to his health if he continued to occupy it.

On the other hand, Senior Federal Counsel Encik Balia Yusof bin Haji Wahi, on behalf of the respondents, had cited the case of *Theresa Lim Chin Chin v. Inspector General of Police* [1988] 2 MLJ 293 where Abdul Hamid CJ (as he then was), sitting alone, had cited with approval the case of *Lau Lek Eng* in the following terms:

> Suffice it to say that I did not find the conditions of detention alleged sufficient to constitute harsh or cruel treatment and therefore this objection failed. In any event, even assuming they did, I am constrained to say that it would not come within the range of cases where *habeas corpus* would issue. In *Lau Lek Eng & 7 Ors. v. The Minister for Home Affairs, Singapore & Anor.* [1972] 2 MLJ 4, Chief Justice Wee Chong Jin said that *habeas corpus* is not an available remedy to an application relating to manner and conditions of detention. I am inclined to subscribe to that view. The remedy may perhaps lie elsewhere.

We consider that having regard to the particular circumstances of the present appeal it is unnecessary for us to determine the point of law advanced by Mr. Karpal Singh for reasons we shall now state.

It is true that before us, Encik Balia Yusof did not attempt to attack the finding of the learned Judge that the appellant had been assaulted and, indeed, in answer to a question by the Court, he categorically stated that for purposes of this appeal the fact of assault should be regarded as common ground since there was no affidavit of denial. Accordingly the appeal was argued before us on the basis that the finding of the learned Judge that the appellant had been assaulted as alleged was correct.

In our view, the concession by Encik Balia Yusof that the fact of assault should be regarded as common ground since there was no affidavit of denial, was mistakenly made because the bare allegation of assault made in the affidavit of the appellant's sister was wholly unsupported by any evidence there being no suggestion that she was herself present at the time of the alleged assault.

Consequently, the allegation of assault by the appellant's sister was worthless as evidence being entirely hearsay.

Similarly, in the absence of a confirmatory affidavit by the appellant, the letter of her solicitors dated 28 September 1990 which, we would repeat, in passing, says "we **understand** that our client had been assaulted while under detention", instead of the common form "we have been **instructed by our client** etc.", (emphasis supplied) suffers from the same defect.

It follows, therefore, that there being not a scrap of evidence that the appellant had been assaulted, there was nothing to rebut and so no need for an affidavit of denial.

We need hardly add that the mistaken concession by Encik Balia Yusof that the fact of assault should be regarded as common ground, is in no way binding on this Court. If he was mistaken then his error cannot oblige this Court to follow that view.

Accordingly, the learned Judge's finding of assault was plainly wrong .

In these circumstances, the factual foundation for the point of law advanced by Counsel for the appellant; to wit, the alleged assault, was conspicuously absent. In view of this, anything we might say on the point would be merely *obiter dicta* and so we express no opinion upon it.

We are fortified in the course we are taking by the words of Bowen LJ, in *Cooke v . New River Co. [1988]* 38 Ch. D. 56 at 71

> *obiter dicta,* like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them, and are a great source of embarrassment in future cases.

The result therefore is that this appeal must be and is dismissed.

MOHD. HABIBULLAH BIN MAHMOOD

v.

FARIDAH BT. DATO TALIB

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HARUN BIN MAHMUD HASHIM, TAN SRI DATO' HJ. MOHD. AZMI BIN DATO' HJ. KAMARUDDIN, TAN SRI DATUK GUNN CHIT TUAN SCJJ
[SUPREME COURT CIVIL APPEAL NO. 02-441-89]
15 DECEMBER 1992

CONSTITUTIONAL LAW: Article 121, 121(1A) of Federal Constitution - Courts of Judicature Act 1964 - Section 23(1) - General jurisdiction on High Court to try all civil proceedings including an action in tort claiming damages for assault and battery - Jurisdiction to grant an injunction to restrain parties from assaulting, harassing and molesting - Action in tort by one spouse against another - Whether Syariah Court has jurisdiction to oust the jurisdiction of the High Court provided under Article 121(1A) - Jurisdiction of Syariah Courts - Section 45(3) of Selangor Administration of Muslim Law Enactment 1952 - Islamic Family Law (Federal Territory) Act 1984 - Section 2 of Syariah Courts (Criminal Jurisdiction Act 1965 - Whether Syariah Court has power to grant an injunction.

FAMILY LAW: Constitutional amendment resulting in Article 121(1A) - Object of the amendment - To prevent conflict of laws - Muslims shall be governed by Islamic Family Law - Whether Article 121(1A) has granted exclusive jurisdiction to the Syariah Courts in administration of Islamic Law - Action in tort by one spouse against other - Marriage in accordance with Muslim rites - Whether action barred by Married Women Ordinance 1957 - Section 9.

PRACTICE & PROCEDURE: Striking out writ and statement of claim - Order 18 r. 19 of RHC 1980 - Parties have submitted to jurisdiction of Syariah Court - Whether can submit to jurisdiction of Civil Court on same subject matter - Abuse of process of Court.

INTERPRETATION OF STATUTES: Amendment to Federal Constitution - Jurisdiction between Civil Courts and Syariah Courts - Conflict of Laws - Courts of Judicature Act 1964 - Intention of Parliament.

This was an appeal against the decision of the High Court, Kuala Lumpur which had held that it has jurisdiction to hear the claim by the respondent-wife against her husband, the appellant for damages and injunction for acts of